November 5, 2004

<u>*BY ELECTRONIC FILING*</u>

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *Written Ex Parte Presentation*

In the Matter of Unbundled Access to Network Elements, WC Docket No. 04-313

Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carrier, CC Docket No. 01-338

Dear Ms. Dortch:

To the familiar taxonomy of "lies, damned lies, and statistics" popularized by Mark Twain, the regional Bell operating companies ("RBOCs") have now added a fourth, even more disturbing category: the UNE "Fact" Report. With the UNE "Fact" Report, the RBOCs have apparently valued bulk over accuracy.

As a result, Cavalier Telephone, LLC and its affiliates (together, "Cavalier") wish to correct some of the blatant falsehoods and flaws in the UNE "Fact" Report. As detailed below, these flaws encompass Cavalier's financial strength, Cavalier's reliance on UNEs to provide VoIP through its Phonom affiliate, Cavalier's heavy dependence on UNEs leased from Verizon in all but one of its networks, and Cavalier's utter absence from several markets where the RBOCs claim it has networks.

Irrational Exuberance About Competition

In Table 10, on page I-17 of the UNE "Fact" Report, the RBOCs quote a recent press release by Cavalier, touting the fact that Cavalier recently became "net income positive." The RBOCs interpret this fact as evidence that "all types of competitive carriers are prospering," without taking into account the five consecutive years of Cavalier's cripplingly high losses that preceded this announcement.

Before it edged into a "net income positive" position in the second quarter of 2004, Cavalier lost over $100 million over the previous five years. It is the height of irony for the RBOCs to try to paint competitors as financially robust, as support for the

RBOCs' campaign to drive up competitors' costs, or to tightly restrict or eliminate access to UNEs. From Cavalier's perspective, the RBOCs are trying to prop up competition just long enough to yank the rug out from underneath it.

The Fallacy of UNE-Based VoIP as Rationale for Eliminating UNEs

In Table 2 on page II-5 of the UNE "Fact" Report, the RBOCs claim that Cavalier's affiliate, Phonom LLC ("Phonom"), offers voice over Internet protocol ("VoIP") service in Maryland, Pennsylvania, New Jersey, Delaware, and Virginia. That statement, standing alone, is nearly accurate: Phonom provides service in those five areas and also in the District of Columbia—albeit not yet to a large number of customers. See ¶ 7 of the October 4, 2004 Declaration of Cavalier's Brad A. Evans in this docket ("Evans Decl.").

As the RBOCs acknowledge, Phonom is an affiliate of Cavalier. (See also Evans Decl. at ¶ 7). As such, Phonom offers VoIP service over a network of dark fiber and high-capacity transport comprised in large part of UNEs purchased from Verizon. Likewise, a large percentage of Phonom's VoIP customers is served over unbundled loops—including high-capacity DS1 loops—purchased from Verizon. While cable television providers in some areas are currently allowing Phonom to serve some of its customers over cable broadband connections, Phonom has no guarantee of continued access to those customers. As a result, Phonom would have no choice but to discontinue most or all of its operations without access to unbundled loops from Verizon. In particular, Phonom's business services would either be sharply curtailed or terminated without access to unbundled high-capacity loops, and Phonom's residential and business services would almost certainly be sharply curtailed or terminated without access to unbundled dark fiber and high-capacity transport.

Thus, the RBOCs are making a circular argument: UNE-based competition exists, and because such competition exists, there is no further need for UNEs. Contrary to this circular fallacy, the emergence of VoIP and other innovative uses for legacy RBOC facilities is a reason to maintain UNE availability. Innovation is a strong source of economic growth—not a reason to eliminate vitally important UNEs like dark fiber, high-capacity transport, and high-capacity loops. Those UNEs are the basis for all of the competition provided by Phonom and other UNE-based VoIP providers.

The Fallacy of UNE-Based Networks as Rationale for Eliminating UNEs

In Table 1 on page III-4 of the UNE "Fact" Report, the RBOCs claim that Cavalier operates a fiber network of approximately 2,000 route miles. Actually, Cavalier's network is slightly more than 2,500 sheath miles. However, over 60% of those sheath miles are leased, and 90% of the leased fiber is leased as dark fiber UNEs from Verizon. That means that over 50% of Cavalier's network is comprised of dark fiber UNEs leased from Verizon. Such heavy reliance on UNE dark fiber thoroughly vitiates the RBOCs' contentions that UNE dark fiber is no longer necessary for competition.

Even of the fiber that Cavalier itself owns, about 28% of it was the product of hard-fought and years-long battles with Verizon, power utilities, and municipalities. (Evans Decl. at ¶¶ 27-40.) The other 72% was built by another power utility and later purchased by Cavalier. (Evans Decl. at ¶ 33.) Elsewhere, Cavalier could not economically construct or purchase its own fiber. (Evans Decl. at ¶¶ 11, 31, 32, and 34.) Moreover, Cavalier also relies upon UNE DS1 and UNE DS3 transport to fill gaps in its fiber network, and to interconnect with Verizon's network.

These facts demonstrate both the difficulty of building a competitive fiber network oneself, and the inherent advantages possessed by legacy monopolists like the RBOCs and local power utilities. The UNE "Fact" Report does not properly account for any of these considerations, or even mention them in passing.

Fiber Fabrication Follies

In Table 1 on page III-14 of the UNE "Fact" Report, the RBOCs quote Cavalier's marketing materials about wholesale services, private line, private OC-48 and Gig-E rings, and metro dark fiber rings. Cavalier offers wholesale "lit" services only on certain portions of its network, because of capacity constraints or other restrictions. (Evans Decl. at ¶ 12.) The company offers dark fiber capacity mainly through contractual arrangements with companies such as City Signal Communications, Inc. ("City Signal") and Elantic Telecom, Inc. (Evans Decl. at ¶¶ 8-9.) In fact, Cavalier freely offers metro dark fiber arrangements only on City Signal's metro networks in Cleveland and Philadelphia (Evans Decl. at ¶ 35)—and not in the eight (8) metropolitan statistical areas (MSAs) claimed by the RBOCs in their UNE "Fact" Report. Cavalier is able to offer dark fiber segments on only some portions of its other networks. (Evans Decl. at ¶ 12.)

The RBOCs' misstatements on this point are fueled by lazy "methodology," fatuous assumptions, and double-counting. The lazy "methodology" is described on page III-18 of the UNE "Fact" Report, where the RBOCs admit that they derived the number of MSAs in which competitors allegedly offer dark fiber by simply equating that offering with "the MSAs in which the carrier operates fiber networks and provides high-capacity services." That "method" of fabricating data is invalid for several reasons. As noted above, Cavalier freely offers dark fiber in only 2 MSAs, not 8 MSAs; with limited segments are available in other areas where Cavalier owns fiber. (Evans Decl. at ¶ 12.) Moreover, high-capacity services could mean simply DS1 loops or DS1 transport, either of which could be offered over UNEs purchased from RBOCs, as Cavalier does with dark fiber UNEs. (Evans Decl. at ¶ 12.) The mere offering of some undefined type and quantity of "high-capacity services" does not necessarily establish a single fact about whether or not dark fiber is available anywhere within an MSA. The RBOCs simply do not account for these facts.

The fatuous assumptions are shown by the RBOCs' failure to recognize the fact that some dark fiber offerings are made through contractual relationships with other entities, such as City Signal, whose dark fiber rings in Cleveland and Philadelphia are managed by Cavalier. (Evans Decl. at ¶ 35.) Thus, the 'data" on page III-18 of the UNE "Fact" Report show Cavalier offering dark fiber in 8 MSAs and City Signal offering dark fiber in 6 MSAs. In fact, the two companies together offer dark fiber in only four MSAs—two where City Signal has networks (Cleveland and Philadelphia-Camden--Wilmington) and two more where Cavalier has networks (Richmond and Norfolk). Morevoer, Cavalier does not even offer dark fiber throughout its entire Richmond and Norfolk networks. (Evans Decl. at ¶ 12).

The same erroneous assumptions underlie the "data" in Table 2 on page III-5 of the UNE "Fact" Report. The RBOCs claim that City Signal serves the Camden, Cleveland, Norfolk, Philadelphia, Richmond, and Wilmington MSAs. Of course, Camden, Philadelphia, , and Wilmington are all part of MSA No. 4, as noted by the RBOCs themselves, in Appendix D (page D-2) of the UNE "Fact" Report. Further, as already noted, City Signal itself serves only 2 MSAs with its own fiber: Cleveland and Philadelphia-Camden-Wilmington. Richmond and Norfolk are served only by Cavalier, which is not a "fiber wholesaler," for reasons including its dependence on UNE dark fiber from Verizon, and Verizon's prohibition of dark fiber resale. (Evans Decl. at ¶ 12.)

Lazy "methodology" and fatuous assumptions together create double-counting and inflate the apparent number of fiber providers. In the situations discussed above, Cavalier and City Signal together offer dark fiber in 4 fiber networks, but the UNE "Fact" Report indicates that the two providers offer dark fiber over 14 networks. The RBOCs' "methodology" thus errs by half an order of magnitude.

Finally, the RBOCs' "methodology" and assumptions extend to some of the RBOCs' other flawed assertions in the UNE "Fact" Report. For example, in Table 12 on page III-19 of the UNE "Fact" Report, the RBOCs cite US LEC's use of services from several providers, including Dominion Telecom, as indicative of "competitive daisy-chaining" between different competitors' networks. Cavalier now operates the network of Dominion Telecom, Inc., now known as Elantic Telecom, Inc. (Evans Decl. at ¶ 8.) Elantic has a long-haul network that primarily ties into power substations and other points of presence, not a network interconnecting central offices through which service can be delivered to specific customers. (Evans Decl. at ¶ 35.) While a network like

Elantic's can be used to interconnect different local networks, or provide point-to-point service, it is no substitute for UNE inter-office transport or high-capacity loops. (Id.)

In short, the RBOCs' UNE "Fact" Report contains numerous errors about the type of wholesale "lit" services and dark fiber segments available from Cavalier, City Signal, and Elantic, and the geographic areas in which those services are available. The RBOCs' "Fact" Report therefore shows not "facts," but a curious amalgamation of half-truths, unsupported extrapolation, and double-counting.

Phantom Networks

Appendix D of the RBOCs' UNE "Fact" Report contains an alleged listing of networks that are "operational" or "on-net," which the RBOCs claim to "involve the use of a CLEC's own facilities. (UNE "Fact" Report at page D-1.) With respect to "data" about Cavalier, the information varies between outright falsity and deep-seated inaccuracy.

First, Cavalier has no network whatsoever in two of the MSAs listed by the RBOCs: Harrisburg/Carlisle, Pennsylvania (MSA 87) and Lancaster, Pennsylvania (MSA 96). Cavalier does not even have customers there.

Second, Cavalier has none of its "own facilities" whatsoever in a third MSA listed by the RBOCs: Trenton-Ewing, New Jersey (MSA 128). Cavalier's services there are supported by one leased DS3 interoffice transport facility leased from Verizon.

Third, Cavalier does actually have network in five of the MSAs listed by the RBOCs: Philadelphia/Camden/Wilmington (MSA 4); Washington, D.C./Arlington/ Alexandria (MSA 7); Baltimore/Towson (MSA 19); Virginia Beach/Norfolk/Newport News (MSA 33); and Richmond (MSA 46). Yet it is only in one of these MSAs—and the smallest one, at that—that Cavalier does not rely heavily on UNE dark fiber and UNE high-capacity inter-office transport leased from Verizon. (See Evans Decl. at ¶¶ 27-34.)

To be fair, Cavalier does own a substantial amount of its own fiber in two of the other MSAs (Philadelphia/Camden/Wilmington and Virginia Beach/Norfolk/Newport News). However, Cavalier has fiber in those locations because of very hard-fought battles with pole owners in Tidewater, Virginia (Evans Decl at ¶ 27) and because of a purchase of fiber built by the communications affiliate of a local power utility in Delaware and New Jersey (Evans Decl. at ¶ 33). However, in the Philadelphia area itself, and in Tidewater, Cavalier today remains heavily dependent on UNE dark fiber leased from Verizon.

In short, while the RBOCs claim that Cavalier has its "own facilities" in 8 MSAs, Cavalier has zero facilities in two of those MSAs, a single DS3 circuit leased from Verizon in one MSA, networks that rely very heavily on UNE dark fiber and UNE high-capcity interoffice transport leased from Verizon in four other MSAs, and a single, hard-won fiber network of its own in one MSA. The RBOCs thus vastly overstate the extent of Cavalier's "own facilities."

Conclusion

As described above, even with respect to Cavalier alone, the UNE "Fact" Report is far too flawed to serve as the basis for any rational policy-making by this Commission. Cavalier therefore respectfully urges the Commission not to rely upon that document to curtail the availability of unbundled network elements such as dark fiber, high-capacity transport, or high-capacity loops in this proceeding.

Rather, Cavalier respectfully requests that the Commission adopt a means of discerning the actual facts that should be the basis for determining whether these UNEs remain available for use by competitors, as urged by Cavalier and its fellow competitors' other filings in these dockets.

Sincerely,

Stephen T. Perkins
General Counsel

cc: Marcus Maher
Jeremy Miller